IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

87-5323

DAVID JOSEPH STEFFEN,

Petitioner

-vs- NO._____

THE STATE OF OHIO,

Respondent

On Writ of Certiorari to

The Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE IMPOSITION OF THE DEATH SENTENCE AFTER A JURY DEATH VERDICT WHERE THE JURY IS INSTRUCTED THAT THEIR "RECOMMENDATION" IS ONLY A RECOMMENDATION AND THAT ACTUAL SENTENCE SHALL BE IMPOSED BY THE TRIAL COURT AFTER "ADDITIONAL PROCEDURES" ARE CONDUCTED.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN CALDWELL V. MISSISSIPPI.

II.

WHETHER ONE MAY CONSTITUTIONALLY BE SENTENCED TO DEATH WHERE THE AGGRAVATING FACTORS WHICH ARE USED TO PROPEL HIM INTO THE ELECTRIC CHAIR MERELY REPEAT ELEMENTS OF THE CRIME OF AGGRAVATED MURDER.

THE COURT HAS GRANTED CERTIORARI TO REVIEW THIS ISSUE IN LOWENFIELD V. PHELPS.

III.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE AFFIRMANCE OF THE DEATH SENTENCE BY THE STATE SUPREME COURT WHICH, IN PERFORMING ITS STATUTORY DUTY TO INDEPENDENTLY WEIGH THE AGGRAVATING FACTORS AGAINST THE MITIGATING FACTORS AND TO DETERMINE (1) WHETHER AGGRAVATION OUTWEIGHS MITIGATION BEYOND A REASONABLE DOUBT; (2) WHETHER THE SENTENCE IS APPROPRIATE AND (3) WHETHER THE SENTENCE IS DISPROPORTIONATELY SEVERE, MISALLOCATES THE BURDEN AND DEGREE OF PROOF IN RULING THAT THE DEATH SENTENCE IS PROPER BECAUSE IT WAS NOT ESTABLISHED THAT MITIGATION OUTWEIGHS AGGRAVATION, IN VIOLATION OF THE STATE STATUTES PLACING THE BURDEN ON THE STATE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT AGGRAVATION OUTWEIGHS MITIGATION.

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WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE THE IMPOSITION OF THE DEATH SENTENCE AFTER THE SENTENCING JUDGE, IN WEIGHING AGGRAVATING FACTORS AGAINST MITIGATING FACTORS, REFUSES TO CONSIDER A STATUTORY MITIGATING FACTOR, AND WEIGHS NONSTATUTORY, UNCONSTITUTIONAL AND UNPROVEN AGGRAVATING FACTORS AGAINST SUBSTANTIAL MITIGATING FACTORS ESTABLISHED BY THE DEFENSE.

THIS ISSUE WAS LEFT OPEN FOR FUTURE CONSIDERATION BY THE COURT IN BARCLAY V. FLORIDA.

V.

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VI.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION

David Joseph Steffen, Petitioner herein, respectfully prays for an order granting a Writ of Certiorari to review the judgment of the Supreme Court of Ohio affirming his conviction and death sentence for aggravated murder, rape and aggravated burglary.

OPINIONS BELOW

The decision of the Supreme Court of Ohio affirming David Steffen's convictions and death sentence was rendered June 24, 1987, is reported at 31 Ohio St.3d 111, 509 NE2d 383, and is attached hereto as Appendix A. The decision of the Court of Appeals, which is unreported, was rendered December 11, 1985, and is attached hereto as Appendix B. The trial court's opinion justifying the death sentence appears as Appendix C. The opinions being voluminous, they are presented in a separately bound appendix.

JURISDICTION

This Petition is timely filed, within 60 days of the judgment below on June 24, 1987, and is founded upon 28 U.S.C. 1257(3), Petitioner asserting here, and in the courts below, violations of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions being voluminous, they are appended hereto as Appendix D.

STATEMENT OF FACTS

David Joseph Steffen, Petitioner herein, was convicted by a jury in the Court of Common Pleas of Hamilton County, Ohio, of aggravated murder, aggravated burglary, rape and of two specifications of aggravating circumstances to the aggravated murder conviction. He was sentenced to death, and maximum sentences on the rape and aggravated burglary convictions. His appeals to the Court of Appeals for the First Appellate District for Hamilton County was denied, as was his appeal to the Supreme Court of Ohio.

In August, 1982, David Steffen was employed by the Hy-Pro Chemical Co. as a door to door salesman of a cleaning product marketed by that company. David approached the residence at 7214 Parkdale, Cincinnati, Hamilton County, Ohio, at about 3:00 P.M. There he encountered a resident of that single family home, Karen Range, 19 years of age (R. 1240). She was in the front yard, and David began his sales talk. He cleaned up a rust spot; Miss Range permitted Petitioner to enter the house to demonstrate the cleaner on other surfaces (R. 1489; 1531). The cleaner worked on the carpet, and was tried on some other surfaces, including the fireplace, where it was compared to the Range's cleaner (R. 65).

After asking whether he could demonstrate the cleaner in the bathroom, Petitioner was led by Miss Range into the bathroom, where he applied some of the substance to the tile grout, but was unsuccessful in removing the stain. He put more cleaner on the spot, intending to let it soak in. When he rose,

Miss Range rose at the same time and Petitioner's arm or head inadvertantly brushed against Miss Range's breast; she began to scream, and Petitioner told her he was not going to hurt her, that the contact had been an accident (R. 1489). Miss Range, however, kept screaming, and Petitioner tried to gag her with the rag, to no avail; he then began hitting her in the face and head, knocking her to the floor; but Miss Range continued to scream. When an attempt to gag her again failed, Petitioner went to the kitchen, obtained a paring knife, and cut Miss Range on the neck and throat, inflicting fatal injuries (R. 1489; 1531). Miss Range died a very short time following the infliction of the wounds, which were deep and very severe (R. 1682); such wounds would cause, and did cause, death in one to two minutes (R. 1714).

David then decided to "rape" Miss Range but he could not get an erection, and the attempt was fruitless (R. 1523; 1531). He then fled the Range home, discarding his shirt and other items.

David, a short time later, telephoned Cincinnati Police and reported that he he had been robbed in the Valley Shopping Center, near the Range home (R. 1333). He had given the investigating officer sufficient personal information to aid in his later apprehension for the killing of Miss Range.

Miss Range's lifeless form was discovered by her mother, Mrs. Laurene Range, when Mrs. Range returned home from work. Police were called and responded shortly thereafter. They found Miss Range's body on the floor of the bathroom; her blouse and bra had been ripped, and her slacks and panties had been pulled down her legs. Semen was found in her vagina and on her panties. Fingerprints corresponding to David's were located in the bathroom (R. 1446). Police photographed the scene, and removed physical evidence from the scene, including a brochure for the Hy-Pro product David had been selling that day, which brochure was found in the Range bathroom.

The next day, Cincinnati Police officers went to Wright-Patterson Air Force Base in Dayton, Ohio, and visited the

residence of Paul Steffen, Petitioner's brother. David was there, and police interviewed him after advising him of his rights (R. 1481). The ostensible purpose for the interview was to obtain more information on the robbery reported by David the day before. Initially, David told the officers that he knew nothing about the killing, but that his twin brother did; later he told the officers that his twin brother had committed the killing, and finally, David admitted that he himself had committed the homicidal act (R. 1489). He later gave police a tape recorded statement which was played at his trial (R. 1531).

David was arrested, and was later indicted by the Grand Jury of Hamilton County, which charged him with aggravated murder with two felony specifications, and also with the rape and aggravated burglary on which those specifications were based. He was tried to a jury in the Court of Common Pleas, Judge Robert S. Kraft presiding.

During the trial, the evidence presented basically indicated the facts as stated herein.

Petitioner raised the defense of insanity, and considerable psychiatric testimony was adduced on both sides of that issue. David's involvement in the homicide was never disputed, but the rape and burglary charges were denied. The jury convicted Petitioner on all charges, and the case was continued for a penalty trial for determination of sentence.

At the penalty trial, the defense introduced a letter written to Karen Range's parents by Petitioner several weeks before the trial expressing remorse and sorrow for what had occurred. Several friends and relatives of Petitioner testified to his miserable childhood; that his stepfather had forced Petitioner to kneel on uncooked rice for hours at a time; had forced him to stay in a cold bathtub full of ice cubes; had tied Petitioner to a crib trussed up in an army bag; forced Petitioner to exercise and to run until he was exhausted; beat Petitioner with a belt and other weapons; forced Petitioner to remain indoors for one entire summer; that Petitioner was a disturbed child and was sent away from time to time, and that

he would be abused by his stepfather when he returned. Petitioner got along fine with and was very protective of, girls and women, and was involved in church and youth activities.

Evidence in the form of psychiatric reports indicated that among the cruel and unusual punishments inflicted upon young David by his stepfather was the bizarre punishment of having dill pickles inserted into his rectum to "cure" him of soiling his underwear when he had diarrhea. At the age of seven, he was sent to a religious school for intractible youngsters, where he had his hair pulled out by the roots as punishment. He was sent at age 11 to a State school, Hawthornden, where punishments included being tortured by electric cattle prods. On one occasion when he was being returned to Hawthornden by state police after having run away, young David mentioned the cattle prods, initiating an investigation which resulted in his being bound naked and subjected to more abuse with cattle prods (Report of Dr. Fisher, Doc. # 111, 112). Dr. Fisher concluded that David was the product of a very abusive, even sadistic childhood. "There are few if any positive memories which he reports. There is a great deal of savage and sadistic brutality." Id. Petitioner made an unsworn statement at his trial, again expressing remorse and regret for what had occurred.

The jury, evidently unmoved, recommended the death sentence, and the trial court sentenced Petitioner to death and filed the written opinion required by law shortly thereafter.

The Court of Appeals, in a 49-page decision, affirmed the convictions and death sentence, finding the death sentence appropriate and that the aggravating factors outweighed the mitigating factors. The Ohio Supreme Court also affirmed.

A motion for rehearing was filed, but arrived a day late at the office of the Ohio Supreme Court. A motion for leave to file the Motion for Rehearing Instanter and to deem the motion timely filed was filed in the Ohio Supreme Court, but that Court has not ruled thereon. Accordingly, to preserve his right

to file this Petition, Petitioner has withdrawn his motion for rehearing in the Ohio Supreme Court and has filed his Petition within the 60 days provided by Rule. A motion for stay of execution of the death sentence is presently pending in the Ohio Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

DESPITE THE REMAND BY THIS COURT TO THE OHIO SUPREME COURT IN ROGERS V. OHIO, ___ U.S. ___, 106 S.Ct. 518, FOR RECONSIDERATION IN LIGHT OF CALDWELL V. MISSISSIPPI, THAT COURT CONTINUES TO AFFIRM DEATH SENTENCES WHERE JURIES HAVE RETURNED DEATH VERDICTS AFTER HAVING BEEN INSTRUCTED THAT THE JURY IS NOT ULTIMATELY RESPONSIBLE FOR IMPOSITION OF THE DEATH SENTENCE.

THE ISSUE

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE IMPOSITION OF THE DEATH SENTENCE AFTER A JURY DEATH VERDICT WHERE THE JURY IS INSTRUCTED THAT THEIR "RECOMMENDATION" IS ONLY A RECOMMENDATION AND THAT ACTUAL SENTENCE SHALL BE IMPOSED BY THE TRIAL COURT AFTER "ADDITIONAL PROCEDURES" ARE CONDUCTED.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN CALDWELL V. MISSISSIPPI.

The trial court instructed the jury at the penalty trial that:

> You must understand, however, the jury recommendation to the Court that the death penalty be imposed is just that, a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court after the Court follows certain additional procedures required by the laws of this State.
>
> Therefore, even if you recommend the death penalty, the law requires the Court to decide whether or not the defendant, David Joseph Steffen, will actually be sentenced to death or to life imprisonment.

(R. 3017; emphasis added).

Caldwell v. Mississippi (1985), 472 U.S. 320, 105 S.Ct. 2633, was decided by this Court when Petitioner's appeal was pending, and the Court of Appeals permitted Petitioner to add the issue, addressed the issue on the merits, and rejected it. The Supreme Court of Ohio also rejected the issue on the merits, 31 Ohio St.3d at 113-114, 509 NE2d at 387-388.

* * * * * * * * *

This Court, in Caldwell, concluded that "it is constitutionally impermissible to rest a death sentence on a determination mad. by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere," 472 U.S. 320, 105 S.Ct. 2633, 2639. This is so because a constitutional capital sentencing scheme relies upon the premise "that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision," McGautha v. California (1971), 402 U.S. 183, 208, 91 S.Ct. 1454, 1467, thus fulfilling the Eighth Amendment requirement of "reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina (1976), 428 U.S. 280, 305; 96 S.Ct. 2978, 2991.

In a case where the instruction to the jury with respect to their lack of ultimate responsibility for the death sentence was less prejudicial than that given here, this Court vacated the death sentence and remanded the matter to the Ohio Supreme Court for reconsideration in light of Caldwell, State v. Rogers ___U.S.___, 106 S.Ct. 518. The Ohio Supreme Court nevertheless reaffirmed the death sentence, State v. Rogers (1986), 28 Ohio St.3d 427, 504 NE2d 52, based on its lengthy analysis of the issue in State v. Buell (1986), 22 Ohio St.3d 124, 489 NE2d 795.*

The Ohio Supreme Court has continued to flout this Court's ruling with respect to the Caldwell issue; see State v. Williams (1986), 23 Ohio St.3d 16, 490 NE2d 906, and, of course, the decision in this case.

There are two aspects to this issue as it is presented in this case which compel the conclusion that the Court should

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* The Ohio Supreme Court, on rehearing, reversed the Rogers decision on other grounds and ordered a new trial on August 12, 1987. ___Ohio St.3d ___, ___NE2d ____.

grant certiorari and reverse. First, the Ohio Supreme Court continues to affirm death sentences in violation of Caldwell, based upon an incorrect and unconstitutional interpretation of Caldwell and the Ohio statutes; second, the instruction given here is more prejudicial than that given in Rogers, and is an instruction which is regularly given in Hamilton County in capital cases. The affirmance below will encourage further constitutional violations of this sort unless the case is reversed and the precise instruction given here is prohibited.

A. The Rationale of the Ohio Supreme Court Justifying the Instruction at Issue, and the death sentence imposed pursuant thereto upon Petitioner is Based on an Incorrect and Unconstitutional Interpretation of Caldwell and of Ohio Law.

The Ohio Supreme Court has given three reasons for upholding the constitutionality of the instruction given here: (1) The Ohio situation is distinguishable from that present in Caldwell because in Mississippi the jury is the sentencing authority, and in Ohio the judge is the ultimate sentencer; (2) The instruction is a correct statement of Ohio law; and (3) The instruction as given does not refer to the appellate process, as did the prosecutor's argument in Caldwell. See State v. Buell, supra., 489 NE2d at 812, State v. Rogers, supra, 504 NE2d at 56. We shall now demonstrate the incorrectness of those conclusions, and the consequent unconstitutionality of the result in this case.

(1) Under the Ohio capital statutes a jury "recommendation" of life imprisonment is absolutely binding upon all trial and appellate courts, and consequently the jury is the ultimate sentencer where life is recommended.

The Ohio Revised Code provides that where the jury in a capital case returns a verdict at the penalty phase recommending life imprisonment with either 20 or 30 years to parole, "the court shall impose the sentence recommended by the jury upon the offender", R.C. 2929.03(D)(2). Thus, what Ohio has is not strictly judge-sentencing, as the Ohio Supreme Court concludes, but a limited override whereby the trial judge may override a jury recommendation of death, but is absolutely bound by a life recommendation. Intermediate appellate courts and the Ohio Supreme Court may also override a death

recommendation by the jury, or a death sentence imposed or affirmed by the lower courts, but may not impose death where the jury has recommended life, R.C. 2929.05.

(2) The instruction given in this case constitutes a misleading and incorrect statement of Ohio law.

As the jury recommendation of life is absolutely binding upon all courts, the instruction given here constitutes a misleading statement of Ohio law, referring as it does to "additional procedures". The jury is not told what those additional procedures are. The jury is free to infer from the instruction at issue here that there are yet other proceedings at which the accused has a chance to avoid the death sentence; additional procedures at which he can present additional evidence which may yet spare his life; additional procedures in the nature of post-conviction or appellate review of the recommendation before the trial court imposes sentence. The possibilities are almost endless.

The trial court's instruction that the court is required to follow certain additional procedures required by state law, weakens the jury's sense of responsibility for its decision. The jury is encouraged to preserve the options of the trial court and to "pass the buck" to one who would not only have the final decision, but who would have more information and evidence on which to base the ultimate decision.

The "additional procedures" element of the instruction aggravates the prejudice caused by the instruction that the jury does not have the final decision, as it makes it even more likely that the jury will recommend death, and that the jury will give unconstitutionally slight consideration to the mitigating factors presented by the evidence.

3. The instruction, referring to "additional procedures" without explaining those procedures, cannot be inferred to exclude reference to the appellate process.

As indicated, the absence of a definition of the "additional procedures" in the instruction here under attack would lead the jury to conclude that there are other procedures in a court of law which could spare the accused. Merely because

the instruction does not specifically refer to appellate review, as did the argument in Caldwell, one cannot rationally conclude, as did the Ohio Supreme Court, that the jury will not reasonably conclude that their decision will not be reviewed. The identity of the reviewing agency, trial court, appellate court, clemency board, etc. is not the prejudicial feature of the instruction; the prejudicial feature is the fact that there will be further judicial review of their death recommendation, with a corresponding attenuation of their awesome responsibility.

We are aware that Caldwell concerns itself with prosecutorial argument, not final instructions. But the constitutional result is the same. Such an argument and the instruction given here are both fundamental error. If anything, the fact that the forbidden instruction came from the trial court and not the prosecutor compounds the error. The jury was not advised that their "recommendation" would carry great weight; this the jury would naturally defer to the trial court, whom they would logically feel is more able and more entitled to make the ultimate sentencing decision; and consequently, the jury having been so instructed, there is a substantial risk that because the instructions misrepresented the effects of the sentence, the jury was induced to forego making their own determination as to whether death was the appropriate sentence, and consequently their recommendation and David Steffen's death sentence are unreliable, Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987).

In addition, the fact that the suggestion comes from the trial court as part of its instructions of law, which jurors are bound by their oaths to follow, renders the error here even more prejudicial than that in Caldwell, which was concerned merely with prosecutorial argument, which jurors are not bound to follow.

In light of the decision of this Court in Caldwell, it is apparent that such an instruction is prejudicial, constitutional error. The "uncorrected suggestion that the responsibility for any ultimate determination of death will

rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Id., 105 S.Ct. at 2642. The instruction conplained of here certainly is an uncorrected suggestion to the jury that the trial judge, not they, has the ultimate responsibility for determining sentence, and that consequently the instruction as given is error of the first magnitude. It cannot be said that this instruction had no effect upon the jury's decision for death, and hence the death sentence imposed herein is unconstitutionally unreliable.

II.

THIS COURT, IN LOWENFIELD V. PHELPS, HAS ACCEPTED FOR REVIEW THE ISSUE PRESENTED HERE, WHETHER THE SAME UNDERLYING FELONY CONSTITUTIONALLY MAY BE TWICE USED TO ELEVATE AN ORDINARY MURDER INTO A CAPITAL AGGRATED MURDER. IT IS APPROPRIATE AND IMPORTANT THAT THIS ISSUE BE RESOLVED ON THIS DIRECT APPEAL FROM THE SUPREME COURT OF A STATE IN WHICH THE VAST MAJORITY OF DEATH ROW INMATES ARE IN JEOPARDY OF THEIR LIVES BECAUSE OF THE UNCONSTITUTIONAL DOUBLE USE OF SUCH UNDERLYING FELONIES.

THE ISSUE

WHETHER ONE MAY CONSTITUTIONALLY BE SENTENCED TO DEATH WHERE THE AGGRAVATING FACTORS WHICH ARE USED TO PROPEL HIM INTO THE ELECTRIC CHAIR MERELY REPEAT ELEMENTS OF THE CRIME OF AGGRAVATED MURDER.

Petitioner first raised this issue in his motion to dismiss the capital specifications on the ground that the Ohio statutes were unconstitutional. He has raised it at every stage since, and all courts have ruled on the merits of the issue.

A. The multiple use of the same felony as an element of the offense and as an aggravating factor unconstitutionally fails to narrow the class of eligible offenders.

Here, Petitioner was convicted of "felony" murder. That is, the homicide of Karen Range was alleged to have been purposeful, making the offense, without more, murder. The homicide was elevated to aggravated murder because of the allegations that the murder occurred during the commission of

the offenses of rape and aggravated burglary. The allegations of those two felonies then were used additionally as specifications to further elevate the homicide offense from aggravated murder to capital aggravated murder. Both appellate courts rejected Petitioner's challenge to this practice,, merely citing prior decisions of the Ohio Supreme Court.

In Zant v. Stephens (1984), 462 U.S.862, 103 S.Ct. 2733 and Barclay v. Florida (1984), 463 U.S. 939, 103 S.Ct. 3418, this Court held that, in a constitutional capital scheme, the function of aggravating circumstances is to genuinely narrow the class of murderers to those deserving, or eligible for the death penalty. The Ohio statutory scheme, wherein the same felony is used to provide an essential element of aggravated murder and, additionally, the specification rendering the offender capitally-eligible, does not utilize the aggravating circumstance in a constitutional manner, as such use of the felony does not and cannot provide the specific and categorical narrowing of the class of capitally eligible offenders; if anything, it broadens the class of capitally eligible offenders, in direct violation of the Eighth Amendment.

Recently, the United States Court of Appeals for the Eighth Circuit has ruled precisely as we urge the Court to rule here: that "Aggravating circumstances, in order to comply with the Eighth Amendment, must 'genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' [Zant v. Stevens, supra, 103 S.Ct. at 2742-2743.] An aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant upon whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying capital crime. Aggravating circumstances serve to reduce the danger that the death penalty will be wantonly or arbitrarily imposed, . . ." Therefore, "an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing

function." and a death sentence resulting from a violation of this principle is unconstitutional and cannot stand, Collins v. Lockhart (8th Cir. 1985), 754 F.2d 258, cert. den. __US__, 106 S.Ct. 546 (1986). The Fifth Circuit has rejected the rule of Collins, creating a conflict between the circuits which this Court has evidently decided to resolve, Lowenfield v. Phelps, 817 F.2d 285, cert. gr. ___U.S.___, 107 S.Ct. 3227 (1987).

B. Multiple use of the same felony to both elevate the crime and then to further enhance the penalty to death unconstitutionally permits the imposition of death for felony murder cases upon less proof than in murder cases involving prior calculation and design, but no felony, and is consequently discriminatory and unconstitutional.

Under the capital provisions of the Revised Code, one can commit aggravated murder in either of two ways: (1) the purposeful killing of another with prior calculation and design, and (2) the purposeful killing of another during the commission, the attempt to commit, or the fleeing immediately after the commission of certain specified felonies. R.C. 2903.01. There is no heirarchy established, and both alternatives are considered equally culpable.

Satisfaction of the requirements under either alternative, however, will not render the offender eligible for the death penalty. In addition, one or more of several statutory aggravating factors must be present, and charged, before the offender is in jeopardy of his life. Among the statutory aggravating factors, however, is one providing that the commission of the aggravated murder during the commission, attempt, or flight after the commission of, the same felonies which made the offense aggravated murder in the first place under R.C. 2903.01 also constitutes an aggravating factor, R.C. 2929.04 (A)(7). The same factor is thus used twice, first to enhance murder to aggravated murder, and then to elevate the aggravated murder to capital aggravated murder. When it is considered that the offender is also separately charged with the underlying felony itself, it is evident that the felony is actually used three times in a capital felony murder situation, and the offender is punished three times for the same act.

Consequently, the Ohio statutes, in felony murder situations, permit the prosecution to obtain the death sentence upon less proof than required to obtain the death sentence in a case involving prior calculation and design plus the presence of a statutory aggravating factor.

The Courts of other states with similar statutes have forbidden such double use of the commission of a felony to elevate the murder to aggravated (or, first-degree) murder, and then to use the same factor to further elevate the offense to capital aggravated (or, first degree) murder. State v. Cherry (N.C. 1979), 257 S.E.2d 551; Provence v. State (Fla. 1976), 337 So.2d 783, cert.den. 431 U.S. 969 (1977); Colley v. State (Ala. 1979), 405 So.2d 374; People v. Harris, 679 P.2d 433 (Cal. 1984).

As this Court has granted certiorari in Lowenfield, and since most of Ohio's nearly 100 death row inmates are in jeopardy of their lives because of the unconstitutional practice condemned in Collins and approved in Lowenfield, the issue is certainly ripe for review in this case, and the Court should grant certiorari and reverse Petitioner's death sentence as having been unconstitutionally obtained.

III.

THE OHIO SUPREME COURT, IN ATTEMPTING TO PERFORM ITS STATUTORY DUTY TO INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING FACTORS, MISALLOCATED THE BURDEN OF PROOF AND MISAPPREHENDED THE DEGREE OF PROOF, RESULTING IN A DEATH SENTENCE WHICH IS NOT ONLY CONTRARY TO STATE LAW, BUT WHICH IS AN AFFRONT TO THE EIGHTH AND FOURTEENTH AMENDMENTS. REVIEW IS NECESSARY LEST THE OHIO SUPREME COURT, AND OTHER STATE SUPREME COURTS, UTILIZE THE DECISION BELOW AS AUTHORITY LEGITIMIZING THE DOCTRINE THAT AN ACCUSED MUST PROVE HE DESERVES TO LIVE IN ORDER TO AVOID THE ULTIMATE SANCTION OF DEATH.

THE ISSUE

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE AFFIRMANCE OF THE DEATH SENTENCE BY THE STATE SUPREME COURT WHICH, IN PERFORMING ITS STATUTORY DUTY TO INDEPENDENTLY WEIGH THE AGGRAVATING FACTORS AGAINST THE MITIGATING FACTORS AND TO DETERMINE (1) WHETHER AGGRAVATION OUTWEIGHS MITIGATION BEYOND A REASONABLE DOUBT; (2) WHETHER THE SENTENCE IS APPROPRIATE AND (3) WHETHER THE SENTENCE IS DISPROPORTIONATELY SEVERE, MISALLOCATES THE BURDEN AND DEGREE OF PROOF IN RULING THAT THE DEATH SENTENCE IS PROPER BECAUSE IT WAS NOT ESTABLISHED THAT MITIGATION OUTWEIGHS AGGRAVATION, IN VIOLATION OF THE STATE STATUTES PLACING THE BURDEN ON THE STATE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT AGGRAVATION OUTWEIGHS MITIGATION.

A death sentence is impossible under Ohio's capital statutes unless the trial jury in the first instance is persuaded, beyond a reasonable doubt that the aggravating circumstances of which the offender was convicted outweigh the mitigating factors present in the case, R.C. 2929.03(D)(2).

On appeal, Ohio's appellate courts are required to independently weigh the aggravating factors against the mitigating factors as well. More specifically, Ohio law places upon the Ohio Supreme Court the duty to

> review and independently weigh all the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence imposed is excessive or disproportionate to the penalty imposed in similar cases. . . . The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

R.C. 2929.05.

In the decision below affirming appellant's death sentence, the Ohio Supreme Court repeatedly misallocated the burden and degree of proof in conducting its independent weighing of aggravation against mitigation:

> Our view of the totality of the evidence compels us to conclude that these combined factors, if in fact these factors are mitigating, are insufficient to outweigh the aggravating circumstances of rape and burglary.

> . . . The history, character and background of the offender have already been explored, supra., with no mitigating factors found sufficient to outweigh the aggravating circumstances. . . . .
>
> . . . While we are sympathetic towards appellant's obviously lamentable past, we must conclude that the mitigating factors are inadequate to outweigh the aggravating circumstances in this case.

31 Ohio St.3d at 128-129, 509 NE2d at 398-399 [Emphasis supplied].

The Ohio Supreme Court, in performing its statutorily mandated independent (hence de novo) review, has misapprehended and misapplied the burden and degree of proof, and consequently, its affirmance of Petitioner's death sentence is unconstitutionally unreliable.

Under state law, the state has the burden of establishing, beyond a reasonable doubt, that the aggravating factors of which the offender was convicted outweigh the mitigating factors. The appellate courts are required by statute to independently weigh the aggravation and mitigation, and are forbidden to affirm a death sentence unless convinced beyond a reasonable doubt that aggravation outweighs mitigation.

The decision below demonstrates that Petitioner was denied his right to that independent review. By upholding his death sentence because the mitigation does not outweigh aggravation, the Ohio Supreme Court has placed the burden upon the accused to establish that mitigation outweighs aggravation. That burden cannot constitutionally be placed upon the accused, particularly where the burden-shifting is done by appellate decree in violation of clearly stated statutory mandates to the contrary, Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975), Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965 (1985).

Where constitutional state capital punishment statutes are violated by the state in the imposition of the death penalty, the Eighth and Fourteenth Amendments are violated, Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976).

And where a state confers an important right or interest upon one accused of crime, and against whom the state seeks to impose a deprivation of life or liberty, the due process clause

of the Fourteenth Amendment will afford to the accused the enforcement of those rights by the federal courts, Vitek v. Jones, 445 U.S. 480 (1980); Wolff v. McDonnell, 418 U.S. 539; Hicks v. Oklahoma, 447 U.S. 343 (1980), Evitts v. Lucey, 469 U.S. 387 (1985).

Petitioner has a substantial and legitimate expectation that he will be deprived of his life only in accordance with, and with the benefit of, the procedural rights conferred upon him by statute. Those statutory rights include an independent weighing by every appellate court, including the Ohio Supreme Court, of the aggravation and the mitigation present in the case. Not only did the Ohio Supreme Court here fail to accord to Petitioner his right to an independent review, the Ohio court twisted the procedural protections afforded petitioner and used them against him.

If aggravation and mitigation are in equipoise, under the statutes, Petitioner is entitled to live, R.C. 2929.03(D)(2). The Ohio Supreme Court has misallocated the burden of proof by thrice holding that, if mitigation does not outweigh aggravation, then the offender must die. Thus, where the mitigation and aggravation are in equipoise, that is, where it is precisely as certain as not that the offender deserves to live, under the application of the decision below the offender must be sentenced to death.

The Ohio Supreme Court thus misallocated the burden of proof at the penalty phase from the state to the defense. But the court below also altered the degree of proof. It has decreed that Petitioner must die unless mitigation outweighs aggravation. Since the statutes actually require death only where aggravation outweighs mitigation beyond a reasonable doubt, the requirement of death here, where mitigation does not outweigh aggravation, places the risk of nonpersuasion on the offender. Thus, if the aggravation and mitigation are in equipoise, by definition one cannot outweigh the other beyond a reasonable doubt, for neither outweighs the other at all. But under the decision below, the defendant will die even where the

state does not prove beyond a reasonable doubt that aggravation outweighs mitigation. This not only offends the Ohio capital statutes, it offends the Constitution, which requires that the state prove each fact or circumstance entitling it to a conviction, or to a certain sentence, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068.

Unless reviewed and reversed, the decision below will work considerable mischief in Ohio and other state courts, mischief of a most ominous sort. Where states seek to exterminate their undesirables, they must be held by the Constitution to the strict application of the procedural and substantive rights they extend to those whose very lives are sought to be held forfeit to the awesome power of the state. Here, the bald and blatant perversion and inversion of the fundamental precepts that the state has the burden to prove beyond a reasonable doubt that the offender must die, must not be permitted to stand any longer than is necessary for this Court to review and reverse the judgment of the Ohio Supreme Court.

IV.

THE COURT LEFT OPEN FOR FUTURE CONSIDERATION IN BARCLAY V. FLORIDA THE ISSUE OF THE CONSTITUTIONAL EFFECT OF THE USE OF NONSTATUTORY, UNCONSTITUTIONAL, UNPROVEN OR IMPROPER AGGRAVATING FACTORS WHERE THE STATE STATUTE REQUIRES THE SENTENCER TO WEIGH AGGRAVATING FACTORS AGAINST MITIGATING FACTORS, AND WHERE SUBSTANTIAL MITIGATION IS PRESENTED BY THE DEFENSE. THIS CASE PRESENTS THE OPPORTUNITY TO RESOLVE THE ISSUE.

THE ISSUE

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE THE IMPOSITION OF THE DEATH SENTENCE AFTER THE SENTENCING JUDGE, IN WEIGHING AGGRAVATING FACTORS AGAINST MITIGATING FACTORS, REFUSES TO CONSIDER A STATUTORY MITIGATING FACTOR, AND WEIGHS NONSTATUTORY, UNCONSTITUTIONAL AND UNPROVEN AGGRAVATING FACTORS AGAINST SUBSTANTIAL MITIGATING FACTORS ESTABLISHED BY THE DEFENSE.

Ohio law requires that the sentence of death may be lawfully imposed only where the aggravating factors of which the accused was convicted outweigh, beyond a reasonable doubt, the mitigating factors offered by the evidence, R.C. 2929.03.

Consideration of nonstatutory aggravating factors will result in the reversal of the death sentence imposed in reliance thereon, State v. Johnson (1986), 24 Ohio St. 3d 87, 494 NE2d 1061, 2941.14(B). The trial court, and the appellate courts reviewing independently the aggravating factors and mitigating factors, must consider all mitigating factors which are present in the case, including, but not limited to, those specified in the statutes, R.C. 2929.04(B).

Here, Petitioner contends that the trial court, in imposing the death sentence, refused to consider the statutory mitigating circumstance of youth [R.C. 2929.04(B)(4]); Petitioner further contends that the trial court sentenced him to death in reliance upon the nonstatutory (in Ohio) aggravating factor of future dangerousness; and in further reliance upon the constitutionally abhorrent nonstatutory aggravating factor of the public demand for retribution.

1. Refusal to consider the youth of Petitioner.

The trial court, in its written opinion purporting to justify the death sentence visited upon Petitioner, after reciting the fact that Petitioner was 23 years old at the time of trial, stated: "There is absolutely no evidence to suggest that he was a youthful offender or that his age was a factor that should be taken into account in mitigation of the sentence of death. This factor was not present." Op. p. 11.

Since Ohio law prohibits execution of those under 18 when the offense was committed, "youth as a mitigating factor can apply only to offenders eighteen or older and naturally should weigh most heavily in favor of those offfenders closest to eighteen," Domozick, "Fact or Fiction: Mitigating the Death Penalty in Ohio," 32 Cleveland State Law review 263 (1983-84), at 279. And, the statute mandates consideration of youth as a mitigating factor.

But the trial court here, rather than considering Petitioner's youth, and weighing it against the aggravating factors, concluded that the factor was not present at all. And

the Ohio Supreme Court compounded the prejudice by also concluding that the court considered youth but found it to be nonmitigating, 31 Ohio St.3d at 117, 509 NE2d at 390. In its own weighing process, the Supreme Court stated that a sentencer, or reviewing court "may properly choose to assign absolutely no weight to this evidence if it considers it to be nonmitigating. . . . Evidence which is not mitigating is not entitled to any weight as a mitigating factor in determining whether such factors outweigh the aggravating circumstances." 31 Ohio St. at 129, 509 NE2d at 399.

The Ohio Supreme Court has misapprehended the reach of the capital statutes. Youth is mitigating and, if present, is required to be factored into the delicate weighing process that will determine whether the offender will live or die. The trial court concluded that the factor is not present. Perforce, this means that the factor was not even weighed, and taints the trial court's sentencing process with unreliability. The Ohio Supreme Court may not, by judicial fiat, declare that a statutory mitigating factor is not mitigating, as it has done here. The presence of the factor may not be such as to equal or overcome the weight of the aggravating factors, but Ohio law and the Constitution require that such factors at least be considered. That was not done here, and David Steffen is in jeopardy of his life as the result.

2. Consideration of Public Demand for Retribution.

In imposing the death sentence upon David Steffen, the trial court stated in open court:

> This is what the Legislature had in mind when it passed the new death penalty law. The Legislature was reacting to the demands of the public for retribution and this is an appropriate case to provide such retribution.

(R. 3050; Emphasis supplied).

The Supreme Court of Ohio sloughed off Petitioner's claim by stating that the trial court's comments were merely made in open court and were not repeated in the written sentencing opinion; the Supreme Court, citing the "presumption of correctness in the proceedings below," held that the brief

remark had no significance such as to taint the sentencing process. 31 Ohio St. 3d at 116, 509 NE2d at 389. Indeed.

No principle of criminal law is more basic to traditional notions of fairness and justice than that one may not be convicted, or sentenced, merely because the public demands it. To hold otherwise, as the courts below have done, is to subject citizens accused of crime to the rule of men and not of law.

It is to be noted that the Ohio Supreme Court did not rule the pandering to public demand as correct; it merely found that the sentencing process was not tainted. If an argument to convict because the public demands it is grossly prejudicial, and it is, then the actual reliance by a sentencing court on such demand in ordering the execution of a citizen is a grave affront to the due process clause and the Eighth Amendment.

3. Consideration of the Nonstatutory Aggravating Factor of Future Dangerousness.

The trial court also stated at the sentencing hearing in which David Steffen was condemned to suffer death:

> The defendant has been described as a human time bomb waiting to explode. He did just that in this case and the results were devastating. There is no evidence to suggest that the same type of delayed explosive reaction could not happen again unless action is now taken to permanently prevent it.

(R. 3049-3050; emphasis supplied).

The trial court thus relied, in part, upon future dangerousness as an aggravating factor which obviously was factored into the statutory weighing process. But future dangerousness is not a statutory aggravating factor in Ohio. David Steffen was not indicted for or convicted of a death specification that he would be a danger in the future unless executed. Only those capital specifications included in the indictment and proved beyond a reasonable doubt may be considered in the capital sentencing process, R.C. 2941.14(B). Consequently, it was error for the trial court to consider this factor in the sentencing process, State v. Johnson, supra.

The Ohio Supreme Court rejected David Steffen's attack on the use of future dangerousness in the same manner that it

rejected his contention that the trial court impermissibly considered and weighed public demand in arriving at the death sentence. The Court merely held that the future dangerousness factor was not mentioned in the written sentencing opinion, but ("only") in open court at sentencing. With respect to this factor, as in the public demand consideration, the Ohio Supreme Court seems to conclude that since the trial court did not include the spoken sentiment (to a packed courtroom) in his written opinion, he didn't mean it. But it is on the record as having been considered, and the consideration of this nonstatutory aggravating factor clearly was considered in the sentencing process, or else the trial court would not have referred to it.

4. The consideration of the aggravated burglary conviction.

David was, however, indicted for and convicted of aggravated burglary and a capital specification based thereon. He had relied in the Court of Appeals on a recent opinion of the Ohio Supreme Court in State v. Barksdale (1983), 2 Ohio St.3d 126, 443 NE2d 501, which held that where one enters premises with permission, the commission of a subsequent felony thereon does not make him a trespasser, and, as trespass is an essential element of aggravated burglary, the offender perforce cannot be convicted of burglary, although he is, of course, criminally liable for whatever felony he does commit on the premises.

The approach of all three courts below to this contention is interesting. The trial court merely ignored Barksdale, and instructed the jury, over objection, that appellant's status was converted from a business invitee to a trespasser when he commenced the homicidal assault. The Court of Appeals ignored this twisting of the law by the trial court, and instead conjured up from thin air a demand by Miss Range to David that he leave the premises. [One who remains on premises after a demand to leave is a trespasser under Ohio law, R.C. 2911.21(A)] That "fact" is nowhere substantiated in the record. The Court of Appeals rationale generated a dissent from Judge Black that nowhere in the record was there any evidence

whatever of a demand to leave.

The trial court having twisted the law, and the Court of Appeals having left the law alone but having conjured up a fact from nowhere to justify the aggravated burglary conviction and the capital specification based thereon, the Ohio Supreme Court borrowed from both approaches. It held that, once the assault commenced, a "powerful inference" arose from which appellant's privilege to remain was terminated and that he knew it. His conscious decision to remain thus satisfied the element of trespass and ostensibly legitimized the conviction of aggravated burglary and its corresponding capital specification. This, of course, legitimized the death sentence as well, under the Court's logic.

5. Contrary to the command of the Ohio capital statutes, the trial court considered the nature and circumstances of the offense as aggravating, rather than mitigating.

The Ohio capital statutes require that the nature and circumstances of the offense be considered for sentencing purposes only as mitigating, R.C. 2929.04(B). That statute provides that the trial court "shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense." The opinion of the trial court contains considerable references, in lurid detail, to the gruesome and horrid facts of the offense. A fair reading of the opinion can lead only to the conclusion that the trial court did indeed consider the nature and circumstances of the offense as aggravating, rather than as mitigating, as the statute requires. Of course, we agree with the Ohio Supreme Court that "the nature and circumstances of some offenses will be such that no mitigating feature can be extracted," 31 Ohio St.3d at 117, 509 NE2d at 390. But we emphaticaly disagree with the Court below that by dwelling upon the morbid facts the trial court was "merely justifying its conclusion that no mitigating factors can be gleaned from the nature and circumstances of htis particular offense." Id.

There having been established no fewer than five violations

of the trial court's obligation to consider only certain aggravating fractors, and to affirmatively consider youth as a mitigating factor, we next turn to the constitutional error in the imposition of the death sentence upon David Steffen which is implicit in these five violations of the statute.

* * * * * * * *

This Court, in Barclay v. Florida, supra., held that a death sentence may constitutionally be imposed, even where nonstatutory aggravating factors are considered, in situations where at least one statutory aggravating factor has been established, and where no mitigation is offered. The rationale is that when the one statutory factor is balanced against (no) mitigation, the aggravation will prevail, and consideration of the other, nonstatutory aggravating factors, is subject to state harmless error analysis.

But Barclay did not involve a situation such as is present here, where improper, nonstatutory aggravating factors are to be weighed against substantial mitigation offered by the defense. The Court in Barclay accepted the fact that the consideration of nonstatutory aggravating factors was error. The touchstone for determining whether the error is reversible is the presence or absence of mitigating circumstances. "As long as mitigating circumstances had been found, it was impossible to know whether the result of the statutorily-required weighing process would have been different in the absence of the impermissible nonstatutory aggravating factor," Id., Stevens, J., concurring, 103 S.Ct. at 3432, n12.

Thus, the error in considering for capital sentencing purposes nonstatutory aggravating factors, or the refusal or failure to consider statutory (or nonstatutory) mitigating factors, or the consideration of lack of mitigation as aggravation, etc., all of which occurred here, is constitutional error of immense proportions, resulting as it necessarily did in the infliction of the death sentence upon David Steffen in violation of the constitutional requirement that the death sentence be applied uniformly and consistently,

with consideration of certain standards to avoid the arbitrary and capricious infliction of the ultimate penalty.

The death sentence imposed upon David Steffen is consequently indelibly stained with the taint of unreliability, warranting review and reversal by this Court. And this is so not for the sole benefit of Petitioner here, but for all those similarly situated, who continue to be subjected to sentencing proceedings in which improper aggravating factors must be weighed by the sentencers against meaningful mitigation offered in their defense. As stated by Justice Stevens, in such cases, "it is impossible to know whether the result of the . . . weighing process would have been different in the absence of the impermissible nonstatutory aggravating factor." This question was left unanswered in Barclay.

It is reasonable to assume that, in most capital cases, the defense is able to muster and to present some mitigation of a nature sufficiently substantial as to warrant consideration and weighing against the aggravating factors established by the prosecution. Most of the cases in this Court, however, have dealt with situations where there was no little or no mitigation offered, e.g., Zant v. Stevens, supra., Barclay v. Florida, supra. Review of this case will provide the opportunity for this Court to instruct the state courts as to the precise use which may be made of such improper factors in death penalty schemes where narrowly circumscribed aggravating factors must be weighed against mitigating factors.

V.

THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE ARE VIOLATED BY THE REFUSAL OF A STATE SUPREME COURT TO CONSIDER FOR COMPARISON PURPOSES UNDER A STATUTORILY-MANDATED PROPORTIONALITY REVIEW OF CAPITAL CASES ONLY THOSE CASES IN WHICH THE DEATH SENTENCE IS IMPOSED. WHILE PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY REQUIRED, STATES MUST BE INSTRUCTED AS TO THE REQUIREMENTS IMPOSED BY DUE PROCESS ON THOSE PROPORTIONALITY REVIEWS THEY HAVE CHOSEN TO AFFORD TO THEIR CITIZENS CONVICTED OF CAPITAL CRIMES.

THE ISSUE

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE REFUSAL OF A STATE SUPREME COURT, IN CONDUCTING A STATUTORILY-REQUIRED PROPORTIONALITY REVIEW OF A DEATH SENTENCE, TO CONSIDER FOR COMPARISON ANY CASES OTHER THAN THOSE IN WHICH THE DEATH PENALTY WAS ACTUALLY IMPOSED AND AFFIRMED.

It is acknowledged that the Eighth Amendment does not require that a state afford proportionality review of death sentences by the state appellate courts, Pulley v. Harris, 465 37, 104 S.Ct. 871 (1984). But it should also be recognized that this Court has applauded the use of state proportionality review schemes as a method of avoiding arbitrary and capricious infliction of the death sentence, Zant v. Stephens, supra., n 19, citing Stephens v. State, 227 S.E.2d 261.

Ohio has chosen to require its appellate courts to conduct a proportionality review of death sentences, R.C. 2929.05. The due process clause requires that such proportionality review comport with the requirements of fundamental fairness in its application, Vitek v. Jones, supra., Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227 (1980).

To David Steffen's contention that the Court should consider for proportionality review all capital cases, not just those in which the death penalty was eventually imposed and affirmed, the Ohio Supreme Court held that "the proportionality review contemplated by R.C. 2929.05(A) should be limited to cases already decided by the reviewing court in which the death penalty has been imposed." 31 Ohio St.3d at 123, 509 NE2d at 395. The Court went on to deny David Steffen's proportionality challenge by citing two other cases in which the Ohio Supreme Court had affirmed rape-murder conviction and death sentences, and concluded that David's death sentence was neither disprtionately severe nor inappropriate.

The prejudicial incorrectness in the procedure enunciated below for future application of proportionality review in Ohio capital cases is not merely in the sterile comparison of this case with two others (both of which involved rape murders of young girls); it is not even in the refusal to compare mitigating factors in all cases involved in the "pool;" it lies

in the refusal of Ohio courts to consider cases where substantial reasons exist for the imposition of the death penalty, but where it is not imposed.

In other states where proportionality review is mandated by statute, the Supreme Courts consider for comparison purposes not only cases in which the death penalty is imposed, but also cases in which the ultimate sanction is not imposed; see, e.g., Stephens v. State, supra. (Georgia); State v. Rogers 341 S.E.2d 713 (N.C. 1986), in which the North Carolina Supreme Court considered a proportionality review pool containing twenty-three death sentences and seventy-six life sentences.

The best example of the shallowness and unconstitutionality of Ohio's proportionality review as outlined in this case is the recent case of one Donald Harvey, who was convicted (in the same Court of Common Pleas of Hamilton County, Ohio which convicted and condemned Petitioner) of 24 counts of aggravated murder and five lesser charges, and sentenced to three consecutive life terms and twenty one concurrent life terms as the result of a plea bargain in which the prosecution did not seek the death penalty. See Appendix E for copies of press reports. No citation is available, as Harvey pleaded guilty and was sentenced on the date this Petition was completed.

Donald Harvey, by his own admission (of some 54 aggravated, premeditated murders, according to his attorney), is probably the most homicidal, monstrous butcher of human beings in the history of Hamilton County and of the entire State of Ohio. Yet under the rule announced below by the Supreme Court of Ohio, no person condemned to death for even one slaying may use Harvey's sentence for comparison purposes.

We do not make light of the offense committed herein. It was a horrible act. But how can a system which strives for the equal application of justice under law constitutionally permit the imposition and affirmance of death sentences in cases, require proportionality review, and then fail to even consider cases such as Harvey's in deciding that it is fair to send David Steffen to his death, and equally fair to spare Harvey who has been convicted of killing twenty-three more persons,

and who was never in jeopardy of the death penalty during the legal proceedings against him?

There may even be valid reasons for such disparity in sentencing; we doubt it. But those condemned to death ought to be permitted to explore those reasons through a meaningful proportionality review and to make of Harvey's sentence what they can before an impartial reviewing court not hamstrung before consideration begins by the decision below which eliminates cases such as Harvey's from consideration.

VI.

THE COURT SHOULD REVIEW AND REVERSE A DEATH SENTENCE WHERE A STATE SUPREME COURT IMPROPERLY INVOKES THE HARMLESS ERROR RULE TO IGNORE A PREJUDICIAL VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT, WHICH VIOLATION IS INSTRUMENTAL IN SENDING THE ACCUSED TO HIS DEATH.

THE ISSUE

WHETHER A STATE MAY CONSTITUTIONALLY CONVICT AN ACCUSED OF AGGRAVATED MURDER AND SENTENCE HIM TO DEATH BY USE OF THE HARMLESS ERROR RULE TO IGNORE A VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AND FOURTEENTH AMENDMENTS IN CONVICTING HIM OF THE UNDERLYING FELONY CHARGE AND ITS CORRESPONDING CAPITAL SPECIFICATION.

The confrontation clause of the Sixth Amendment secures to all persons accused of crime the right to confront and cross-examine the witnesses against them; the guarantee is effective against the states through the due process clause of the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065 (1965).

Here, David insisted that he did not rape Miss Range, but tried to have intercourse with her after the attack which took her life. David stated that he was unable to get an erection, and intercourse was not consummated. However, semen was found in her vagina, and in the crotch of her panties, which had been pulled down her legs. The identity of the depositor of the semen was a significant issue at trial. Miss Range's fiance, one Shrider, was tested by police, as were Petitioner and Miss Range, for comparison of blood and semen samples, etc. The testing could not exclude wither Petitioner or Shrider as the

depositor of the semen.

The significance of the identity of the depositor of the semen is clear; if David did not deposit the semen, then he did not rape Miss Range. If he did not rape Miss Range, then the capital specification associated with the rape charge would fall, and his death sentence would have to be reconsidered.

In this context, the error in the admission of Miss Range's mother's testimony that Karen had told her she was a virgin and would remain so until married, consitutes grossly prejudicial error. The Ohio Supreme Court rejected the state's contention that the hearsay statement was not error. And it concluded that

> Even clearly relevant evidence is inadmissible if its probative value is substantially outweighed by a danger of unfair prejudice. . . . The potential for prejudice in Karen's statement is considerable. We believe it should not have been admitted. However, we are compelled to conclude that this error was, in the final analysis, harmless. Even if this hearsay testimony were excluded from consideration, the overwhelming persuasiveness of the remaining evidence would still be undeniable. Appellant confessed to the murder and there was substantial physical evidence to support his conviction of rape beyond a reasonable doubt. Thus, the error was harmless.

31 Ohio St.3d at 120, 509 NE2d at 392.

In footnote 11, the Ohio Supreme Court sets forth the physical evidence it holds as sufficient to establish rape beyond a reasonable doubt. But that evidence ignores the fact that semen was found in the crotch of Miss Range's panties, which had been pulled down her legs. If, as the Ohio Supreme Court concluded, "the semen was probably deposited while the victim was prone without her ever again being ambulatory," Id., there would have been no semen in the crotch of her panties. Additionally, the coroner found no trauma to the vagina. None, not even microscopic. And he conceded that the perfect drop of blood on the mons veneris which presumably would have been smeared during intercourse, could have dripped onto Miss Range from the wall, from the knife, or from Petitioner's glasses. Finally, the lack of blood on Miss Range's exposed nether regions indicates that she was slain before, not after, she was partially disrobed.

The purpose of the foregoing paragraph is not to persuade

the Court of David's innocence of the rape charge. It is, rather, to indicate that there is also physical evidence which compels the conclusion opposite to that reached by the Ohio courts: that David was not the depositor of the semen.

In this context, then, the admission of the hearsay statement of Miss Range was not only not harmless error, it was constitutional error of the first magnitude, a violation of the confrontation clause of the Sixth Amendment which was used to propel David Steffen into the electric chair. The Court is urged to review this issue and to hold that, with the need for heightened reliability in capital cases, use of the harmless error rule to ignore constitutional errors which obviously had an effect upon the result will not be tolerated.

CONCLUSION

For the reasons stated, the Court is urged to grant this petition for a Writ of Certiorari, and to reverse the convictions and death sentence imposed by the Ohio Courts.

Respectfully submitted,

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